

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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AMANDA E. V.,

Plaintiff,

v.

Civil Action No.  
5:23-CV-687 (DEP)

MARTIN J. O'MALLEY,  
Commissioner of Social Security,<sup>1</sup>

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY  
OF MID-NEW YORK, INC.  
120 Bleecker Street, 2<sup>nd</sup> Floor  
Utica, NY 13501

CINDY DOMINGUE-HENDRICKSON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
OFFICE OF GENERAL COUNSEL  
6401 Security Boulevard  
Baltimore, MD 21235

JASON PECK, ESQ. and

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

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<sup>1</sup> Plaintiff's complaint named Kilolo Kijakazi, in her official capacity as the Acting Commissioner of Social Security, as the defendant. On December 20, 2023, Martin J. O'Malley took office as the Commissioner of Social Security. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

## ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c), are cross-motions for judgment on the pleadings.<sup>2</sup> Oral argument was heard in connection with those motions on July 18, 2024, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

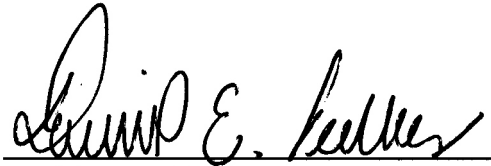
After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

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<sup>2</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: July 23, 2024  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
AMANDA V.,

Plaintiff,

-v-

5:23-CV-687

MARTIN J. O'MALLEY,  
COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

**DECISION TRANSCRIPT  
BEFORE THE HONORABLE DAVID E. PEEBLES**

July 18, 2024  
100 South Clinton Street, Syracuse, NY 13261

For the Plaintiff:

LEGAL SERVICES OF CENTRAL NEW YORK  
120 Bleecker Street  
2nd Floor  
Utica, New York 13501  
BY: **CINDY DOMINGUE-HENDRICKSON, ESQ.**

For the Defendant:

SOCIAL SECURITY ADMINISTRATION  
6401 Security Boulevard  
Baltimore, Maryland 21235  
BY: **JASON PECK, ESQ.**

*Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR  
Official United States Court Reporter  
100 South Clinton Street  
Syracuse, New York 13261-7367  
(315) 234-8545*

1 (The Court and all parties present by telephone.  
2 Time noted: 1:43 p.m.)

3 THE COURT: Let me begin by thanking counsel for  
4 excellent presentations. I've enjoyed working with you and  
5 you've presented some interesting and intriguing issues,  
6 including with respect to step five, which I'll address  
7 momentarily.

8 Before I address the merits of this case, I wanted to  
9 broach the subject of consent. When this case was filed, it  
10 was, pursuant to our General Order 18, assigned to magistrate  
11 judge -- it was assigned to -- originally to magistrate judge --  
12 I can't find it, but one of my colleague magistrate judges and a  
13 consent form was executed by attorney Elizabeth Lombardi on  
14 behalf of the plaintiff. It left blank the identity of the  
15 magistrate judge and it simply says, "voluntarily consents to  
16 have United States magistrate judge blank conduct all further  
17 proceedings in this case to disposition."

18 I wanted to make sure, does plaintiff consent to my  
19 jurisdiction to hear and decide the case?

20 MS. DOMINGUE-HENDRICKSON: Yes, your Honor.

21 THE COURT: All right. Thank you.

22 Plaintiff has commenced this proceeding pursuant to  
23 42, United States Code, Sections 405(g) and 1383(c)(3) to  
24 challenge an adverse determination by the Commissioner of Social  
25 Security finding that plaintiff was not disabled at the relevant

1 times and therefore ineligible for the benefits sought.

2 The background is as follows: Plaintiff was born in  
3 August of 1986. She is almost 38 years of age. She was  
4 33 years of age at the time of her application for benefits on  
5 December 30, 2019, and almost 33 at the time of the alleged  
6 onset of her disability on July 3, 2019. She stands 5'7" in  
7 height and weighs approximately 150 pounds.

8 Plaintiff has had various living arrangements  
9 throughout the course of this case. At one time she lived with  
10 her mother and daughter. This was at the time of the hearing  
11 conducted on November 1, 2022. She has also lived in a homeless  
12 shelter and at the YMCA, and she also reportedly lived in a  
13 rented room in 2020.

14 Plaintiff is unmarried. She has one daughter who was  
15 age 13 on November 1, 2022. She is in the custody of the  
16 plaintiff's mother. Plaintiff is right-handed. She has a dog.  
17 She has a 9th grade education, although the evidence is  
18 equivocal as to whether she actually finished 9th grade. At  
19 page 665 of the Administrative Transcript, there is indication  
20 she completed the 9th grade. She testified at the hearing,  
21 however, at page 52 that she had not. She has not received a  
22 GED. While in school, she attended regular classes.

23 Plaintiff does not drive and does not take public  
24 transportation. Plaintiff stopped working in December of 2012.  
25 She quit at that time. When working, she was a cashier in a

1 pizza parlor. She worked in a convenience store in the deli  
2 department. She worked on an assembly line. She was in  
3 housekeeping and was a warehouse selector at one point.

4           Physically, plaintiff suffers from several  
5 impairments, including lumbar degenerative disc disease post  
6 laminectomy, an anoxic brain injury caused by an overdose,  
7 and -- I will spell this out -- she suffers from ankylosing,  
8 A-N-K-Y-L-O-S-I-N-G, spondylitis, which I understand is a type  
9 of arthritis that causes inflammation in the joints and  
10 ligaments of the spine and may also affect peripheral joints,  
11 like knees, ankles, and hips. She also suffers from chronic  
12 obstructive pulmonary disease, or COPD, neck pain, arthritis in  
13 her back, leg, and hands, irritable bowel syndrome, and hearing  
14 loss for which she uses hearing aids and a recommendation has  
15 been made for a cochlear plant.

16           Mentally, plaintiff has suffered from a drug overdose  
17 that occurred in or about May of 2016. She also suffers from  
18 bipolar disorder, posttraumatic stress disorder, anxiety,  
19 depression, and dysthymic disorder. There was a reported  
20 suicide attempt by her in May of 2016.

21           Plaintiff's activities of daily living, as indicated  
22 at page 698 and other portions of the Administrative Transcript,  
23 include plaintiff's ability to dress, bathe, groom, care for her  
24 support dog, clean, do laundry, shop seven days a week. She  
25 socializes a little, she builds jewelry, she watches television,

1 she plays video games. Plaintiff is a smoker and has smoked one  
2 pack of cigarettes per day on average.

3           Procedurally, plaintiff applied for Title XVI  
4 benefits on December 30, 2019, alleging an onset date of July 3,  
5 2019. There are prior unfavorable decisions based on earlier  
6 applications. Those decisions were from October 19, 2016, and  
7 July 2, 2019. In support of her current application, she  
8 alleges disability based upon PTSD, bipolar disorder,  
9 depression, anxiety, a traumatic brain injury, hearing loss,  
10 COPD, lower back issues, and arthritis.

11           A hearing was conducted on July 12, 2022, by  
12 Administrative Law Judge Bruce Fein, F-E-I-N. It was adjourned  
13 to give plaintiff an opportunity to seek representation. A  
14 subsequent hearing was held with a vocational expert on  
15 November 1, 2022, by ALJ Fein who then issued a subsequent  
16 unfavorable decision on November 16, 2022. The Social Security  
17 Administration Appeals Council denied plaintiff's application  
18 for review on May 23, 2023. This action was commenced on  
19 June 8, 2023, and is timely.

20           In his decision, ALJ Fein applied the familiar  
21 five-step sequential test for determining disability. At step  
22 one, he concluded plaintiff had not engaged in substantial  
23 gainful activity since December of 2019 and noted that she last  
24 worked, apparently, in 2012.

25           At step two, he concluded that plaintiff does suffer



1 from severe impairments that impose more than minimal  
2 limitations on plaintiff's ability to perform basic work  
3 functions, including bilateral sensorineural hearing loss,  
4 lumbar degenerative disc disease, post lumbar laminectomy, a  
5 toxic brain injury, ankylosing spondylitis, COPD, bipolar  
6 disorder, dysthymic disorder, generalized anxiety disorder, and  
7 PTSD.

8           At step three, he concluded that plaintiff's  
9 conditions do not meet or medically equal any of the listed  
10 presumptively disabling conditions set forth in the regulations  
11 of the Commissioner, specifically considering listings 1.15,  
12 2.10, 3.02, 11.18, 14.09, 12.02, 12.04, 12.06, and 12.15.

13           Reviewing the evidence, ALJ Fein next concluded that  
14 plaintiff is capable of performing the following residual  
15 functional capacity notwithstanding her impairments: She can  
16 perform light work, except she can occasionally climb ramps or  
17 stairs, ladders, ropes, or scaffolds; can occasionally balance,  
18 stoop, kneel, crouch, or crawl; and frequently handle, finger,  
19 and feel bilaterally. She should avoid concentrated exposure to  
20 noises at the louder higher level as defined in the Dictionary  
21 of Occupational Titles and the Selected Characteristics of  
22 Occupations, and concentrated exposure to pulmonary irritants  
23 such as fumes, odors, gases, dust, poorly ventilated areas, and  
24 she will need to have ready access to restroom facilities in the  
25 workplace. She can perform work limited to simple, routine, and

1 repetitive tasks with only occasionally interaction -- that's a  
2 typographical error -- with supervisors, coworkers, and the  
3 public. She can work in a low stress job defined as having only  
4 occasional decisionmaking, changes in the work setting, and  
5 judgment required on the job.

6 Counsel, if you could mute your phone. We're getting  
7 a ringing on the phone.

8 Applying that RFC at step four, the ALJ concluded  
9 that plaintiff has no past relevant work to consider and thus  
10 proceeded to step five where, with the benefit of a vocational  
11 expert's testimony, he concluded that there is available work in  
12 the national economy that plaintiff is capable of performing,  
13 citing as representative positions garment sorter,  
14 dispatcher/router, and mail clerk/mail sorter.

15 As you know, my task is limited in this case to  
16 determining whether correct legal principles were applied and  
17 the resulting determination is supported by substantial  
18 evidence, defined as such relevant evidence as a reasonable mind  
19 would find sufficient to support a conclusion. It is an  
20 extremely deferential standard, as the Second Circuit noted in  
21 *Brault v. Social Security Administration Commissioner*, 683 F.3d  
22 443 from the Second Circuit, 2012. In that case, the Second  
23 Circuit noted that the standard is even more deferential than  
24 the clearly erroneous standard and observed that under that  
25 standard, once an ALJ finds a fact, it can be rejected only if a

1 reasonable factfinder would have to conclude otherwise. The  
2 standard was later and more recently reiterated in *Schillo v.*  
3 *Kijakazi*, 31 F.4d 64 from April 6, 2022.

4 In this case, plaintiff has raised several  
5 contentions, two of which I treated in tandem. In the first,  
6 she alleges error in the weighing of medical opinions,  
7 specifically citing the opinions of Dr. Geoffrey Hopkins, who is  
8 reportedly a treating physician, and gave an opinion together  
9 with Nurse Practitioner Hayley Craner, the opinion of consultive  
10 examiner Dr. David Schaich, S-C-H-A-I-C-H, and the prior  
11 administrative medical findings of doctors J. Ochoa and H.  
12 Ferring. Secondly, she cites alleged error in the evaluation of  
13 her hearing impairment. And thirdly, she challenges the RFC  
14 reasoning level and portrays an alleged potential conflict in  
15 respect of the reasoning level between the testimony of the  
16 vocational expert and the DOT that required the ALJ to probe and  
17 resolve.

18 Turning first to the evaluation of the medical  
19 opinions. As the Commissioner correctly argues, because this  
20 application was filed after March 27, 2017, the case is subject  
21 to the amended regulations regarding opinion evidence. Under  
22 those regulations, the Commissioner will not defer or give any  
23 specific evidentiary weight, including controlling weight, to  
24 any medical opinions, including those from medical sources, but  
25 instead must consider whether those opinions are persuasive by

1 primarily considering whether they are supported by and  
2 consistent with the record in the case, 20 C.F.R. Section  
3 416.920c. When an ALJ weighs a medical opinion, he or she must  
4 articulate how persuasive he or she finds the opinions and  
5 explain how he or she considered the factors of supportability  
6 and consistency.

7 In this case, the first medical opinion addressed was  
8 that of Dr. Hopkins and Nurse Practitioner Craner. It was dated  
9 October 7, 2022. It appears at pages 1449 to 1454. It notes  
10 that plaintiff's treatment began with Dr. Hopkins on July 7,  
11 2022, and was monthly. There are several marked limitations  
12 defined as 11 to 20 percent of the workday or workweek,  
13 including two in the domain of understanding, remembering, or  
14 applying information, two in the domain of interacting with  
15 others, and five in the domain of concentration, persistence, or  
16 maintaining pace. The opinion also finds one marked limitation  
17 in adapting or managing oneself and indicates that plaintiff  
18 would be absent more than four days per month and late more than  
19 four days per month.

20 The Administrative Law Judge addressed that medical  
21 opinion at page 28 and found it to be, quote, "less persuasive."  
22 As reasons, he stated that the marked limitations opined are not  
23 supported by clinical records of those providers, which there  
24 are none, or by objective medical evidence as a whole, and  
25 specifically noted plaintiff's activities of daily living.

1           The plaintiff argues that although it is a checkbox  
2 form, that is not alone a sufficient reason to reject the  
3 opinions noted on the form, she further maintains that while the  
4 treating source rule has been abrogated, there are cases that  
5 suggest that a treating source perspective is still important,  
6 particularly if there's a lengthy treatment relationship.  
7 Clearly, a treatment relationship is a factor that the  
8 regulations speak to. In this case, however, plaintiff was only  
9 seen by Dr. Hopkins approximately four times and there are no  
10 records of treatment in the -- in the Administrative Transcript  
11 from which the Court could review whether they support or not  
12 the opinions.

13           It is a checkbox form. There is minimal discussion.  
14 On the front page, there are diagnoses noted, there are some  
15 statements concerning clinical findings, and it was noted that  
16 plaintiff was seen monthly for medication management and that  
17 symptoms are responding well to current medications. At the end  
18 of each section, however, the form requests an explanation or  
19 examples that would elaborate upon the check boxes in each of  
20 those domains and those are blank.

21           I recognize that in *Colgan v. Kijakazi*, 22 F.4d 353,  
22 from January 3, 2022, that the Second Circuit has noted that the  
23 mere fact that an opinion is on a checkbox form in and of itself  
24 is not a basis to fully discount it. In that case, however, it  
25 was noted that the checkbox form was supported by voluminous

1 treatment notes gathered over the course of nearly three years  
2 of clinical treatment by the physician whose opinion was in  
3 question, and this case is entirely different. There's no  
4 explanation in addressing the specifics of each of those domains  
5 and no treatment notes in the record whatsoever from Dr.  
6 Hopkins, and so I don't find any error in discounting Dr.  
7 Hopkins' opinion. I'll note that that conclusion is also  
8 supported by *Heaman v. Berryhill*, and that is at 765 F. App'x  
9 498, from March 13, 2019, Second Circuit.

10 The next opinion that was addressed is Dr. David  
11 Schaich. That is from June 1, 2020. It appears at pages 695 to  
12 700 of the Administrative Transcript. And the opinion notes  
13 several, what I would characterize as, marked limitations,  
14 including in the ability to use reason and judgment to make  
15 work-related decisions, in the ability to interact adequately  
16 with supervisors, coworkers, and the public, marked limitation  
17 in ability to sustain concentration and perform a task at a  
18 consistent pace, and marked limitation in the ability to  
19 regulate emotions, control behavior, and maintain wellbeing.

20 The Administrative Law Judge found that opinion to be  
21 less persuasive. The discussion is at pages 27 and 28 of the  
22 Administrative Transcript and the Administrative Law Judge noted  
23 that the clinical findings of the consultative exam did not  
24 completely support the conclusion concerning the marked  
25 limitations. And although I will note that there's certainly

1 some portions of the clinical findings that may arguably support  
2 it, judgment poor, insight limited, the findings also show that  
3 plaintiff's affect was of a full range and appropriate to speech  
4 and thought content, mood was reported as okay, sensorium was  
5 clear, plaintiff was oriented to person, place, and time,  
6 attention and concentration were intact, and recent and remote  
7 memory skills were only mildly impaired due to cognitive  
8 difficulties. So it doesn't -- I can't say that that reason is  
9 invalid.

10           It also is pointed out by the Administrative Law  
11 Judge that the limitations are inconsistent with objective  
12 medical evidence, including claimant's course of treatment and  
13 reported activities. And as the Administrative Law Judge noted  
14 at pages 26 to 27, they are robust. Plaintiff lived in an  
15 apartment by herself with her dog, has friends in the building  
16 and on Facebook, regularly goes to the Family Dollar store near  
17 her building. She walks her dog, she shops, she walks, she  
18 plays games on her phone, she lives independently, takes care of  
19 activities of daily living. She told the consultative examiner  
20 she could dress, bathe, groom herself, prepare food, clean, do  
21 laundry, shop. She reported she socialized a little. Family  
22 relationships were good and her hobby was building jewelry. She  
23 plays video games, she watches television, she shops seven days  
24 a week. At one point, she lived with roommates, watched movies,  
25 and played games on her phone. So a fairly robust indication of

1 the ability to perform activities of daily living. Once again,  
2 I am unable to say that the Administrative Law Judge erred in  
3 the weight given to this medical opinion.

4           The last is from Drs. Ochoa and Dr. Ferring. Dr.  
5 Ochoa on June 6, 2020, gave an opinion concerning plaintiff's  
6 mental capacity. It appears at 107 to 124 of the Administrative  
7 Transcript. In terms of the so-called B criteria, Dr. Ochoa  
8 indicated a mild limitation in understanding, remembering, or  
9 applying information, a moderate limitation in interacting with  
10 others, a moderate limitation in concentration, persistence, and  
11 maintaining pace, and a moderate limitation in adapting or  
12 managing oneself.

13           In terms of the mental RFC, he stated the following  
14 at 122 -- he or she, I don't know which: Totality of the  
15 evidence indicates the claimant can understand and remember  
16 detailed instructions and procedures, sustain concentration to  
17 complete ordinary work tasks on a sustained basis, interact in  
18 an appropriate manner, and adapt to routine work-related changes  
19 and make work-related decisions.

20           The ALJ found that opinion to be more persuasive at  
21 page 28 and found that it is supported by a review of the  
22 medical evidence, including the report of the consultative  
23 examiner, noted that the person giving that prior administrative  
24 medical finding was familiar with the agency's disability  
25 programs, and there was support for the assessment with



1 references to clinical findings. The finding of Dr. Ochoa was  
2 later affirmed in an opinion given by Dr. Ferring on April 9,  
3 2021. It appears at 126 to 153. It was addressed by the  
4 Administrative Law Judge together with Dr. Ochoa's opinion.

5 I'll note that although I understand that there are  
6 cases that suggest, particularly in mental health cases, that  
7 the opinion of a non-examining consultant should be looked at  
8 carefully. Nonetheless, the case law is clear that a prior  
9 administrative medical finding can provide substantial evidence  
10 if it is supported, *Woytowicz v. Commissioner of Social*  
11 *Security*, 2016 WL 6427787, from the Northern District of New  
12 York, October 5, 2016, report and recommendation of Magistrate  
13 Judge William B. Carter, adopted at 2016 WL 6426385, and that's  
14 October 28, 2016.

15 I agree with the plaintiff that perhaps it might be  
16 entitled, as I said, a little bit less weight because it  
17 involves an inherently subjective situation, *Dana F. V.*  
18 *Berryhill*, 2019 WL 7067060, and that is from the Northern  
19 District of New York, December 23, 2019. Nonetheless, I am  
20 unable to say that the Commissioner erred in relying on the  
21 opinions of Dr. Ochoa and Dr. Ferring. Plaintiff argues that  
22 those opinions are stale and did not have the benefit of  
23 subsequent evidence, but I did not see any evidence of  
24 significant deterioration in plaintiff's condition such that  
25 would undermine the opinions of Dr. Ochoa and Dr. Ferring.

1           The plaintiff complains of the residual functional  
2 capacity and the sufficiency of dealing with plaintiff's hearing  
3 condition. An RFC represents a finding of the range of tasks a  
4 plaintiff is capable of performing notwithstanding the  
5 impairments at issue, 20 C.F.R. Section 416.945(a). That means  
6 that an RFC represents a claimant's maximum ability to perform  
7 sustained work activities in an ordinary setting on a regular  
8 and continuing basis, meaning eight hours a day for five days a  
9 week or an equivalent schedule, *Tankisi v. Commissioner of*  
10 *Social Security*, 521 F. App'x 29, Second Circuit, 2013. And, of  
11 course, an RFC must be informed by all of the evidence of  
12 record, including opinion evidence, treatment notes, and other  
13 relevant evidence.

14           In this case, plaintiff clearly has hearing issues.  
15 She has hearing aids and is a candidate for a cochlear implant  
16 in her left ear. There's an opinion from Dr. Putcha, the agency  
17 consultant, that does not include any limitations with regard to  
18 hearing. At page 118, Dr. Putcha opined that with regard to  
19 noise, plaintiff was unlimited. In Dr. Siddiqui's subsequent  
20 residual functional capacity prior administrative medical  
21 finding, he did specifically state that plaintiff will be  
22 precluded from jobs requiring perfect binaural hearing. That's  
23 at page 143, and also indicated at 144 that plaintiff needs to  
24 avoid even moderate exposure to noise.

25           Dr. Elke Lorensen examined the plaintiff and issued a

1 report on July 27, 2020, at page 758 through 764. She noted the  
2 hearing loss issue on the first page, but did not include any  
3 limitation addressing either noise or plaintiff's ability to  
4 hear.

5 It seems to me that there are two issues here. One  
6 is plaintiff's ability to hear. And of course, the backdrop is  
7 that it's plaintiff's burden to establish limitations associated  
8 with any impairments that she may have.

9 In this case, the plaintiff did not show any  
10 difficulty at the time of the hearing to communicate. Page 41  
11 of the Administrative Transcript indicates that she proceeded in  
12 the hearing without hearing aids. The Administrative Law Judge  
13 did touch upon hearing and stated on page 25, as for claimant's  
14 bilateral sensorineural hearing loss, as well as others, the  
15 evidence of record does not support the allegations regarding  
16 the intensity, persistence, and limiting effect of those  
17 conditions. So I find that plaintiff has not carried her burden  
18 of demonstrating that there should have been a limitation in the  
19 RFC concerning her ability to hear.

20 In terms of noise level, that appears to be an issue  
21 and was addressed in the residual functional capacity, as I  
22 indicated previously. So if, in fact, as plaintiff argues that  
23 a quiet job is required for the plaintiff because of her  
24 sensitivity to noise, as defendant argues, the router position  
25 is, under the DOT, listed as a noise level two, quiet, and the

1 router is 222.587-038. And so there appear to be -- if you  
2 eliminate the other two jobs, there's sufficient number  
3 nonetheless, of jobs available to the plaintiff to satisfy the  
4 Commissioner's burden at step five, *Bavaro v. Astrue*, 413 F.  
5 App'x 382, from the Second Circuit, 2011. So if there is error  
6 in that regard, it is harmless.

7 Which brings me to the last issue, which, frankly,  
8 intrigued me and perplexed me a little bit. There are three  
9 positions cited in the ALJ's decision. As I indicated, the  
10 router is one. And a router under reasoning is listed as level  
11 two, which is defined as, "apply common sense, understanding, to  
12 carry out detailed, but uninvolved written or oral instructions,  
13 deal with problems involving a few concrete variables in or from  
14 standardized situations." The position of garment sorter, which  
15 is DOT 222.687-014, is also a level two reasoning position, and  
16 so it would be subject to the same explanation. The third is  
17 mail clerk. That position is a level three reasoning position,  
18 which is defined as follows: Apply common sense, understanding  
19 to carry out instructions furnished in written, oral, or  
20 diagrammatic form, deal with problems involving several concrete  
21 variables in or from standard deviations.

22 Plaintiff argues that it is the defendant's burden,  
23 which, of course, is true at step five and that it was not met  
24 in this case. It is well accepted that elicitation of testimony  
25 from a vocational expert is a proper means of fulfilling the

1 agency's burden at step five of the disability test to establish  
2 the existence of jobs in sufficient numbers in the national and  
3 regional economy that plaintiff is capable of performing, *Bapp*  
4 *v. Bowen*, 803 F. 2d 601, from the Second Circuit, 1986. And, of  
5 course, that depends on the hypothetical posed to the vocational  
6 expert being identical to the residual functional capacity  
7 finding. In this case, that burden was satisfied.

8           The argument of plaintiff is that she's not capable  
9 of performing at level three reasoning and, secondly, based upon  
10 *Gibbons v. Commissioner of Social Security*, 2023 WL 3830774,  
11 from the Second Circuit, June 6, 2023, and under *Lockwood v.*  
12 *Commissioner of Social Security*, 914 F.3d 87, from January 23,  
13 2019, and Social Security Ruling 00-04P, there was a potential  
14 conflict between the vocational expert's testimony and the DOT  
15 that resulted in a burden to the Administrative Law Judge to  
16 flush out and resolve.

17           Let me say first that the courts in this case have  
18 made it clear that level two jobs, which I indicated the router  
19 and garment sorter are, level two reasoning is consistent with  
20 simple, routine, and repetitive tasks, *Edwards v. Astrue*, 2010  
21 WL 3701776, Northern District of New York, September 16, 2010,  
22 *Timothy M. v. Kijakazi*, 2021 WL 4307455, from September 22,  
23 2021 -- and I'll note that that decision also collects several  
24 other cases standing for that proposition -- and *Reynolds v.*  
25 *Commissioner of Social Security*, 2012 WL 2050410, Northern

1 District of New York, June 6, 2012.

2           There are matters, including, for example, access to  
3 the bathroom facilities that are not addressed in the Dictionary  
4 of Occupational Titles. At page 56 of the Administrative  
5 Transcript, the Administrative Law Judge stated the following:  
6 "So I will assume that your testimony," that being the  
7 vocational expert, "will be based upon your knowledge,  
8 education, training, and experience and is consistent with the  
9 Dictionary of Occupational Titles unless you tell me otherwise.  
10 All right?" And the response was, "yes, your Honor." And, of  
11 course, during the testimony there was no indication of any such  
12 conflict.

13           The Second Circuit's decision in *Gibbons* presented me  
14 a little bit of a challenge as to whether or not it is  
15 inconsistent with the cases cited above by implication. It  
16 clearly dealt with level three jobs, and so I am not relying on  
17 the reasoning level three job to find that the Commissioner  
18 satisfied his burden. I'm dealing with garment sorter and  
19 router only, but I don't believe *Gibbons* should be followed in  
20 this case because it is distinguishable. In that case, first of  
21 all, the plaintiff's counsel signaled, at least implicitly, that  
22 there was a potential conflict and that the client in that case  
23 might not be able to perform at that level three reasoning.

24           In this case, as I indicated previously, the level  
25 two requirement is that the plaintiff can apply common sense,

1 understanding to carry out detailed, but uninvolved, written or  
2 oral instructions, deal with problems involving a few concrete  
3 variables in or from standardized situations, and I don't find  
4 that to be in conflict with the RFC in this case, which limited  
5 the plaintiff to simple, routine, repetitive tasks and that she  
6 work in a low stress job defined as having only occasional  
7 decisionmaking, changes in the work setting, and judgment  
8 required on the job. So I don't find that *Gibbons* required the  
9 Administrative Law Judge to probe any potential conflict because  
10 I don't believe there was one, and so I'm going to follow  
11 *Timothy M., Edwards, and Reynolds* and find that there is no  
12 conflict between the RFC in this case and plaintiff's ability to  
13 meet level two reasoning.

14 So in summary, I don't find any error with regard to  
15 addressing the hearing issue. I don't find any error with  
16 regard to the medical opinions. I view plaintiff's challenge as  
17 simply requesting that I reweigh the opinions, which is not a  
18 proper function of the Court, and I don't find any issue with  
19 the Commissioner's meeting his burden at step five, so I will  
20 grant judgment on the pleadings to the defendant and order  
21 dismissal of plaintiff's complaint.

22 I hope you both have a good rest of your summer.  
23 Thank you.

24 THE COURTROOM DEPUTY: Court is adjourned.

25 MS. DOMINGUE-HENDRICKSON: Thank you, your Honor.

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(Time noted: 2:26 p.m.)



CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR, Official U.S. Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 22nd day of July, 2024.

s/ Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR  
Official U.S. Court Reporter